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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1946**

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**No. 881**

**A. L. ANDREWS, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH  
CIRCUIT**

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## **OPINION BELOW**

The opinion of the circuit court of appeals (R. 75-77) is reported at 157 F. 2d 723.

## **JURISDICTION**

The judgment of the circuit court of appeals was entered October 23, 1946 (R. 77), and a motion for rehearing (R. 78-79) was denied December 16, 1946 (R. 81). The petition for a writ of certiorari was filed January 13, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37

(b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

#### **QUESTION PRESENTED**

Whether a tire ration certificate is a "writing" within the meaning of Section 28 of the Criminal Code, proscribing forgery of "any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing" for the purpose of defrauding the United States, and knowingly uttering as true, or possessing with intent to utter as true, any such forged instrument for such purpose.

#### **STATUTES AND REGULATIONS INVOLVED**

Section 28 of the Criminal Code (18 U. S. C. 72) provides in pertinent part:

Whoever shall falsely make, alter, forge, or counterfeit \* \* \* any bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing for the purpose of defrauding the United States; or shall utter or publish as true, or cause to be uttered or published as true, or have in his possession with the intent to utter or publish as true, any such false, forged, altered, or counterfeited bond, bid, proposal, contract, guarantee, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, knowing the same to be false, forged, altered, or counterfeited \* \* \* shall be fined not

more than \$1,000 or imprisoned not more than ten years, or both.

The Act of June 28, 1940, c. 440, 54 Stat. 676, as amended by the Act of May 31, 1941, c. 157, 55 Stat. 236, and by Title III of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 177, 50 U. S. C. App., Supp. V, 633 (50 U. S. C. App., Supp. V, 1152), provides in pertinent part:

SEC. 2 (a) (2). \* \* \* Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

\* \* \* \* \*

SEC. 2 (a) (5). Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

\* \* \* \* \*

SEC. 2 (a) (8). The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

Sections 2.5 and 2.6 of General Ration Order No. 8, as amended (8 F. R. 3783; 8 F. R. 9626; 9 F. R. 1325; 9 F. R. 2746), provide:

SECTION 2.5 *Acquisition, use, transfer or possession of counterfeited or forged ration document.* (a) No person shall acquire, use, permit the use of, transfer, possess or control any counterfeited or forged ration document under circumstances which would be in violation of section 2.6 if the document were genuine or if he knows or has reason to believe that it is counterfeited or forged.

SECTION 2.6 *Acquisition, use, transfer or possession of ration document.* No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person shall use or transfer a token or other ration document except in a way and for a purpose permitted by a ration order.

## STATEMENT

On November 6, 1945, an indictment in five counts was returned against petitioner in the District Court for the Northern District of Georgia (R. 2-11). Count 1 charged that on or about April 30, 1945, for the purpose of defrauding the United States by impeding the orderly administration of a governmental function, namely, the due and proper administration of the rules and regulations promulgated under the Second War Powers Act relating to the distribution and use of automobile tires, petitioner uttered and published as true "certain false, forged, simulated and counterfeit documents and writings," to wit, "three certain tire certificates,"<sup>1</sup> well knowing them to be false, forged, simulated and counterfeit (R. 2-4). Count 2 charged that petitioner, with like purpose and knowledge, had in his possession with intent to utter and publish as true the same three forged tire certificates (R. 4-7).<sup>2</sup> On April 4, 1946, after a jury trial, petitioner was found guilty on counts 1 and 2 and not guilty on counts 3, 4, and 5 (R. 12), and on April 10, 1946, he was sentenced generally to 18 months' imprisonment (R. 65). On appeal to the Circuit

<sup>1</sup> Photostats of the tire certificates were incorporated in the count (see R. 4).

<sup>2</sup> It is unnecessary to summarize the allegations of the last three counts (R. 7-11), since petitioner was acquitted under them (R. 12).

Court of Appeals for the Fifth Circuit, the judgment of conviction was affirmed (R. 77).

The evidence adduced by the Government is summarized in the opinion of the circuit court of appeals (R. 75-77), and since the questions raised by the petition for a writ of certiorari do not require review of the evidence, it is unnecessary more particularly to summarize it here.

#### ARGUMENT

Petitioner contends that the forged documents involved, tire ration certificates, are not documents coming within the purview of Section 28 of the Criminal Code, *supra*, p. 2 (Pet. 2, 4), the statute upon which counts 1 and 2 were evidently predicated.<sup>3</sup> He appears also to contend that his offenses were punishable only under the Second War Powers Act *supra*, p. 3 (Pet. 4).<sup>4</sup> So far as the record discloses, neither of these points was specifically urged in the trial court or brought to the attention of the circuit court of appeals until petitioner applied for a rehearing (R. 78-79). There is no merit in either contention.

(a) So far as is here pertinent, Section 28 of the Criminal Code makes it unlawful knowingly

<sup>3</sup> While counts 1 and 2 did not specifically refer to, or allege violation of, Section 28, they followed the language of that section, and there is in fact no dispute that they were based on it (see R. 65, 66, 75, 78-79).

<sup>4</sup> As we understand it, petitioner does not contend that the evidence would not have been sufficient under the Second War Powers Act, if the statute is applicable.



to utter or publish as true, or knowingly to have in one's possession with intent to utter or publish as true, "any \* \* \* forged \* \* \* writing, for the purpose of defrauding the United States." It is settled that a defrauding of the United States does not necessarily mean causing it pecuniary loss, and that a purpose to impair the administration of a governmental function is a purpose to defraud the United States. *Hammerschmidt v. United States*, 265 U. S. 182, 188; *United States v. Plyler*, 222 U. S. 15, 17; *United States v. Serpico*, 148 F. 2d 95 (C. C. A. 2); *Head v. Hunter*, 141 F. 2d 449, 451 (C. C. A. 10); *Johnson v. Warden*, 134 F. 2d 166, 167 (C. C. A. 9), certiorari denied, 319 U. S. 763; *United States v. Goldsmith*, 68 F. 2d 5, 7 (C. C. A. 2), certiorari denied, 291 U. S. 681; *Goldsmith v. United States*, 42 F. 2d 133, 136 (C. C. A. 2), certiorari denied, 282 U. S. 837. It seems too clear for argument that the forging of tire ration certificates, or the uttering of such forged certificates, would have the effect of "impeding, hampering, interfering with and obstructing the orderly administration of a Governmental function; namely, the due and proper administration of the rules and regulations promulgated under \* \* \* the Second War Powers Act, relating to the distribution and use of automobile tires," as charged in the indictment (see R. 2-3). Cf. *United States v. Raskin*, 52 F. Supp. 343, 345 (E. D. N. Y.); *United States v.*

*Mullin*, 51 F. Supp. 785, 787 (E. D. Mo.). As this Court has said, "The object of that section [R. S. § 5418, of which Section 28 was a substantial reenactment] was to protect the general government against the consequences that might result from the forgery, alteration or counterfeiting of documents, records or writings, that had some connection with its business, as conducted by its own officers." *Cross v. North Carolina*, 132 U. S. 131, 138. The use of the words "or other writing," following the enumeration of particular writings, denotes "the comprehensive scope of the legislation." *Head v. Hunter*, 141 F. 2d 449, 450 (C. C. A. 10); cf. *United States v. Raskin*, 52 F. Supp. 343, 346 (E. D. N. Y.). And, we think, the particular writings enumerated in the section, as this Court has held in respect of the enumerated writings in the companion Section 29 of the Criminal Code, 18 U. S. C. 73, "have no common characteristic from which a purpose may be inferred to restrict the statute to any particular class of writings." *Prussian v. United States*, 282 U. S. 675, 679. It has, moreover, consistently been held, in all the reported decisions that have considered the question, that a gasoline ration coupon is a "writing" within the meaning of Section 28. *United States v. Serpico*, 148 F. 2d 95 (C. C. A. 2); *United States v. Raskin*, *supra*; *United States v. Mullin*, *supra*. We perceive no

reason why tire ration certificates should not occupy the same status.\*

(b) Petitioner's implied contention (Pet. 4), which he made expressly in his motion for rehearing in the court below (R. 79), that Section 28 was "impliedly repealed (as respects the possession and passing of counterfeit rationing certificates) by the Second War Powers Act" is untenable. The Second War Powers Act did not itself proscribe possession and transfer of counterfeit ration certificates, but (so far as is

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\* The following types of "writings" have been held to be within the scope of Section 28: Vouchers certifying to the character, physical capacity, etc., of applicants for civil service positions (*United States v. Plyler*, 222 U. S. 15); a permit to sell Indian trust property (*Head v. Hunter*, 141 F. 2d 449, 450-451 (C. C. A. 10)); a physician's prescription for narcotics (*Johnson v. Warden*, 134 F. 2d 166, 167 (C. C. A. 9), certiorari denied, 319 U. S. 763; *United States v. Hall*, 58 F. Supp. 772 (E. D. N. Y.)); receipts for payment of taxes issued by a person impersonating a federal employee (*United States v. Goldsmith*, 68 F. 2d 5, 6-7 (C. C. A. 2), certiorari denied, 291 U. S. 681); a letter written to an American consul for the purpose of inducing him to authenticate a passport admitting an alien to the United States (*Goldsmith v. United States*, 42 F. 2d 133, 134-136 (C. C. A. 2), certiorari denied, 282 U. S. 837); physicians' prescriptions for intoxicating liquor (*United States v. Tynan*, 6 F. 2d 668 (S. D. N. Y.)); a "declaration sheet" fraudulently filled out at a civil service examination by another than the applicant (*United States v. Bunting*, 82 Fed. 883 (E. D. Pa.)); an owner's oath required to be taken before making an entry of goods at the custom house, an import entry, and an importer's bond (*United States v. Lawrence*, Fed. Cas. No. 15,572, 26 Fed. Cas. 878 (C. C. S. D. N. Y.)).

here pertinent) merely gave the President authority to allocate materials in short supply and to issue, through a subordinate agency, rules and regulations deemed necessary to effectuate the power so conferred. Pursuant to this authority, the Office of Price Administration issued General Ration Order No. 8, Section 2.5 of which proscribed the transfer and possession of counterfeited or forged ration documents (*supra*, p. 4). It cannot, of course, be seriously contended that this administrative regulation could operate to repeal an Act of Congress, even *pro tanto*. Nor, we submit, can it be successfully contended that Congress intended to repeal any prior statute to the extent that some future executive order or regulation, issued pursuant to the authority conferred by the Second War Powers Act, might duplicate a prohibitory provision contained in such statute. Cf. *United States v. Gilliland*, 312 U. S. 86; see also *United States v. Serpico*, 148 F. 2d 95 (C. C. A. 2), where the identical contention advanced by petitioner was specifically rejected. Of course, the fact that petitioner violated Section 2.5 of General Ration Order No. 8 and might have been prosecuted therefor under the Second War Powers Act was no bar to his prosecution under Section 28 of the Criminal Code, which his activities also offended. *United States v. Raskin*, 52 F. Supp. 343, 346 (E. D. N. Y.).<sup>9</sup>

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<sup>9</sup> See footnote on p. 11.

## CONCLUSION

The judgment below denying petitioner's motion for rehearing, wherein he first made the contentions he now makes in his petition for a writ of certiorari, is correct, and no conflict of decisions or important question is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

✓ GEORGE T. WASHINGTON,  
*Acting Solicitor General.*

THERON L. CAUDLE,  
✓ *Assistant Attorney General.*

✓ ROBERT S. ERDAHL,  
✓ PHILIP R. MONAHAN,  
*Attorneys.*

FEBRUARY 1947.

\* Even assuming, *arguendo*, that petitioner's activities violated only the Second War Powers Act, as he contends, it may be observed that his general sentence of 18 months was less than the maximum imprisonment penalty which could have been imposed under that Act (one year on each of counts 1 and 2). It is well settled that a general sentence on several counts is valid if it does not exceed the aggregate punishment which could have been imposed on such counts. *Levine v. Hudspeth*, 127 F. 2d 982, 984 (C. C. A. 10), certiorari denied, 317 U. S. 628; *McKee v. Johnston*, 109 F. 2d 273, 275 (C. C. A. 9), certiorari denied, 309 U. S. 664; *Ross v. Hudspeth*, 108 F. 2d 628, 629 (C. C. A. 10); *United States v. Sposato*, 73 F. 2d 186, 187 (C. C. A. 2); *Jones v. Hill*, 71 F. 2d 932 (C. C. A. 3); *Warden of United States Penitentiary Annex v. DeLondi*, 62 F. 2d 981, 982 (C. C. A. 10); *Flynn v. United States*, 57 F. 2d 1044, 1047 (C. C. A. 8), certiorari denied, 287 U. S. 627; *Hawkins v. United States*, 14 F. 2d 596, 597-598 (C. C. A. 7), certiorari denied, 273 U. S. 740; *Rice v. United States*, 7 F. 2d 319, 321 (C. C. A. 9); *Neely v. United States*, 2 F. 2d 849, 852-853 (C. C. A. 4).